

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In Re:                                     : 09-10497 (RDD)
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      FORTUNOFF HOLDINGS, LLC,           :
                                           : White Plains, NY
      Debtor.                             : September 15, 2010
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GAZES, et al.,                             : 10-03339-(RDD)
                                           :
      Plaintiff,                         :
                                           :
      v.                                 :
                                           :
NEW YORK STATE DEPARTMENT OF LABOR,       :
                                           :
      Defendant.                         :
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TRANSCRIPT OF (Doc.2) MOTION FOR PRELIMINARY INJUNCTION  
MEMORANDUM OF LAW, (Doc.15) MOTION TO DISMISS ADVERSARY  
PROCEEDINGS, (Doc.16) MOTION TO FILE CORRECTED BRIEF, (Doc.19)  
RESPONSE TO OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION  
AND OPPOSITION TO CROSS-MOTION TO DISMISS COMPLAINT HEARD  
BEFORE THE HONORABLE ROBERT D. DRAIN  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Trustee: IAN J. GAZES, ESQ.  
Gazes LLC  
32 avenue of the Americas  
New York, New York 10013

For the Defendant: New York Attorney General's Office  
BY: SETH KUPFERBERG, ESQ.  
Assistant Attorney General

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1 THE COURT: All right. Fortunoff.

2 (Pause in proceedings)

3 (Recess)

4 THE COURT: Okay. We're back on the record in In Re:  
5 Fortunoff and Gazes v. New York DOL.

6 MR. GAZES: Good afternoon, Your Honor. Ian Gazes of  
7 Gazes LLC, counsel to the Trustee in connection with this  
8 motion by the Trustee for an injunction staying the DOL  
9 administrative hearing. The DOL has asserted an opportunity to  
10 appoint an administrator to hear and determine the Warren Act  
11 [sic] claims and in addition to that as Your Honor is well  
12 aware, there is a class action certification being sought by  
13 the employees as well. The parties to the class certification  
14 are here and also as well there is this claim resolution  
15 process. So we have these three avenues of which the Trustee  
16 is faced --

17 THE COURT: And that's because the DOL has filed a  
18 proof of claim in the case?

19 MR. GAZES: That's right.

20 THE COURT: Okay.

21 MR. GAZES: The DOL has actually filed two proofs of  
22 claim and one asserting administrative status for approximately  
23 \$5 million and one is a pre-petition priority claim for  
24 approximately \$5 million.

25 We've looked at all the claims just to give you a

1 little bit of background and we've actually cleansed all the  
2 data. We've exchanged all this data with regard to the wages;  
3 who the employees are, who would be qualified, who would not be  
4 qualified from the various, I believe, there are five  
5 locations. We've shared that with both parties in an effort to  
6 at least arrive at what we think might be the number. The DOL  
7 has one number which we agree with to some extent and the class  
8 certification defendants -- plaintiffs have a different number.  
9 We initially initiated negotiations with the DOL to see if we  
10 can resolve this issue of which I don't want to discuss on the  
11 record, although Mr. Golden -- his declaration appears to have  
12 revealed some of that -- and in addition we've reached out to  
13 the employees who are being represented by the class  
14 certification process to see what numbers we can come to with  
15 them in an overall basis as you know I would try to do to reach  
16 a global resolution to try and put all these things aside  
17 because we're burning money at an exceeding [sic] rate,  
18 gathering all of this, trying to negotiate all this and it's  
19 been a particularly difficult and cumbersome task because there  
20 are more than 50,000 e-mails on a server that was put down and  
21 sold so we had to extract all of this data in order to even  
22 determine the validity of our defenses which, we believe, are  
23 quite strong to the Warren Act claims, both the federal and  
24 state.

25 So we initially had to comply with the document

1 subpoena by the DOL, the class action plaintiffs have been kind  
2 enough to sit back to a great extent to as we've discussed to  
3 allow the process to unfold to see (1) how much money we'll  
4 ultimately come out with and see, you know, what we can resolve  
5 this for in a future date. So that's been put off for quite  
6 some time as well.

7 I had requested extensions on the subpoena because  
8 needed to get all the information over to the DOL and in fact  
9 we gave them cleansed data, although not revealed in Mr.  
10 Golden's declaration. If it were not for the data we gave them  
11 they would never have been able to arrive at a number even to  
12 know what it is that they're seeking here.

13 Our accountants -- the Trustee's accountants --  
14 cleansed all that data, actually calculated it all out; who was  
15 full-time, who was part-time, who was qualified, what locations  
16 are relevant to the claim itself, all of which, of course, is  
17 without prejudice to the Trustee's right to assert that there  
18 is no claim at all subject to the defenses.

19 So we came upon now before Your Honor seeking a stay  
20 of the administrative law hearing and in summary there are only  
21 three bases of which we're seeking that stay; one would be the  
22 Section 105 injunction, the other would be the bankruptcy Rule  
23 7065 injunction and the third would be that the police power  
24 under the 362 exception would not apply because we don't  
25 believe this is an exercise of police power.

1           There is one other possibility here, Your Honor,  
2       which I've been thinking about and reading about and that would  
3       be the first filing rule since the class --

4           THE COURT: I've been reading about that too.

5           MR. GAZES: -- since the class certification has  
6       filed an adversary proceeding some seven or nine months prior  
7       to the DOL seeking the administrative law hearing, I might give  
8       you, I suppose, another handle to hang a hat on if you were  
9       inclined to support the Trustee's position to find that, well,  
10      we only have a pending action and why allow another one to go  
11      forward? This is the first priority, the first filing and  
12      let's proceed with that action. Again, that's without  
13      prejudice for the Trustee's position that there may not be an  
14      permissible class certification here but that would always  
15      leave, ultimately, a claims resolution process. We do have  
16      employees who have filed proofs of claim, albeit not all of  
17      them, and so there always is three ways of which to deal with  
18      the situation. My goal, of course, is to do it in the most  
19      efficient and cost effective manner and not to waste judicial  
20      economy on matters that do not necessarily need to be before  
21      you.

22           We believe the 105 injunction sought here is very  
23      strong. As you can tell from our papers, we believe that there  
24      could be inconsistent judgments here, that the DOL is seeking  
25      to assess a liability for all employees when not all employees

1 have filed proofs of claim. I think there's about 100  
2 employees who have not filed proofs of claim which has a  
3 significant impact upon the overall the claim itself. We  
4 believe that there may be res judicata issues --

5 THE COURT: I guess I didn't -- I see how that might  
6 relate to timing issues but if the DOL has standing to assert  
7 the claim and the ability under the statute to pay it out to  
8 those who are harmed, why does it matter whether only some  
9 filed a proof of claim? I know that's relevant to the class  
10 proof of claim argument but how is that relevant to this  
11 dispute?

12 MR. GAZES: Well, there's an inconsistency here. The  
13 bar date was set --

14 THE COURT: Right.

15 MR. GAZES: -- within the bankruptcy context --

16 THE COURT: But the DOL filed within the bar date.  
17 Didn't they file their proof of claim timely?

18 MR. GAZES: Yes, they did. They did file a proof of  
19 claim timely but they're not pursuing on behalf of the  
20 employees, they're pursuing the -- they're seeking to be  
21 recompensed as an agency to pay out to the employees. The  
22 employees have a reservation of rights under the statute to  
23 pursue their individual claims.

24 THE COURT: Right.

25 MR. GAZES: So I divided that where --

1 THE COURT: But is there a valid -- I mean if they  
2 have standing to do that under their statute, then I'm not sure  
3 how the bar date fits into it as long as they filed their  
4 timely claim -- the DOL has. Maybe I'm missing something here.  
5 It just seemed to me that -- I mean is there some argument that  
6 they shouldn't be allowed to pay it out to the people because  
7 the individuals didn't file their proof of claim?

8 MR. GAZES: I believe so, Judge.

9 THE COURT: All right.

10 MR. GAZES: Because the claims themselves are part of  
11 the bankruptcy process and the DOL is seeking to collect 100  
12 percent of all those claims and pay employees to the prejudice  
13 of those who did file proofs of claim who hadn't filed them and  
14 absent the DOL agency action those employees who did not file  
15 the proofs of claim would not participate in the distribution  
16 if Your Honor was to find that employees who failed to file the  
17 proofs of claim are not entitled to a distribution. So, hence,  
18 it's an inconsistency.

19 We have the Code saying, we believe, that you have to  
20 file a proof of claim in order to participate in the  
21 distribution, we have the DOL asserting on behalf of its agency  
22 that they're entitled to collect for all the employees and then  
23 distribute that money to all the employees. In addition,  
24 there's that reservation of privacy rights for the individual  
25 employees to pursue their claims themselves. So I'm like in

1 three different fields here just alone with the DOL itself.

2 THE COURT: But can't the -- I understand there are  
3 practical benefits in keeping everything together but doesn't  
4 the New York statute permit that the individual claimants can  
5 do it at the same time that the DOL does it? I mean  
6 administratively, I agree, it's kind of odd but doesn't it  
7 contemplate that you can be subject to both individual  
8 claimants' lawsuits and a DOL lawsuit?

9 MR. GAZES: Which is exactly why the 105 injunction  
10 is needed.

11 THE COURT: Okay.

12 MR. GAZES: That's the whole purpose of it.

13 THE COURT: So it's really basically for just  
14 coordinating all of this?

15 MR. GAZES: It is, otherwise the estate is expending  
16 funds dealing with three or four different fronts --

17 THE COURT: Right.

18 MR. GAZES: -- unnecessarily and, frankly, it's quite  
19 burdensome. I mean we have a host of issues in the case as  
20 Your Honor is aware and that's why the case primarily converted  
21 to deal with and to be defending actions, the allowance of  
22 which or the allowability of those claims in all these  
23 different forms just doesn't make any sense.

24 THE COURT: Okay.

25 MR. GAZES: It's just not cost effective. In

1 addition, there could be findings-of-fact made by the  
2 administrator in the DOL proceeding which will have res  
3 judicata effect in my class action proceeding if there is going  
4 to be one or in the claims resolution process and we don't  
5 believe that that's appropriate as well and which is another  
6 reason why the 105 injunction is necessary.

7 THE COURT: If you could just give me a thumbnail  
8 sketch about the financial status of the estate at this point?  
9 Is it likely that there will be a distribution to unsecured  
10 creditors?

11 MR. GAZES: That all depends on the resolution of  
12 these claims. That also depends on the resolution of the  
13 503(b)(9) claims which we've started to work on, they're  
14 anywhere from \$5 million to \$11 million. If I'm able to bring  
15 down those claims to the numbers that I think I can I believe  
16 that there will be depending, again, on what my preference  
17 recoveries are going to be. That's where our principal asset  
18 is at this point and I have approximately \$4.8 million in the  
19 account now. I've burned about \$600,000.00 in legal fees so  
20 far subject, of course, to Your Honor's approval and that would  
21 be in addition to the accountant's fees.

22 THE COURT: And is there a possibility, though, that  
23 -- or a reasonable possibility that the estate won't be able to  
24 pay priority claims? Leave aside admin claims for a second,  
25 I'm just focusing on, you know, the priority claims because a

1 portion of these claims are priority as opposed to admin, a  
2 portion that would arguably -- are unsecured so what's the  
3 picture on paying still --

4 MR. GAZES: I don't know, Your Honor. I have not  
5 addressed the -- I have not viewed or looked at the priority  
6 claims at this point.

7 THE COURT: And is there a reasonable possibility of  
8 administrative insolvency?

9 MR. GAZES: That all depends on our resolution of the  
10 503(b)(9) claims and our recoveries from the preferences.

11 THE COURT: Okay.

12 MR. GAZES: I mean, look, I have \$80 million in  
13 preference actions out there. You know, if I'm projecting just  
14 a ten percent recovery and I bring in \$8 million there is a  
15 likelihood that at least I'll be reaching the priority if not  
16 the general unsecureds.

17 THE COURT: Okay. All right. Okay.

18 MR. GAZES: So, you know, I think this has been  
19 briefed to death, Your Honor. I know you've seen a lot of  
20 papers on this so we moved under the 105 injunction. We  
21 believe that we meet the threshold requirements for the 105  
22 injunction and we believe that there is a possibility and  
23 probably a great likelihood of inconsistent judgments. We're  
24 exposing the estate to risk of collateral estoppel. There will  
25 be burdens on the estate's management, meaning I'll be devoting

1 my resources and time towards the claims resolution process wit  
2 the DOL action and we'll be diverting all my manpower towards  
3 that process and we believe that under Section 105 we should be  
4 able to enjoin the DOL from pursuing the administrative action  
5 at this time.

6 THE COURT: Okay.

7 MR. GAZES: We also moved under 7065, Your Honor. We  
8 believe that we've reached all of the elements of that as well.  
9 We believe that we have shown that there's irreparable harm  
10 coming to the estate, that there's a likelihood of success on  
11 the merits. I've given the Court a good deal of a semblance of  
12 our defenses that we have to the action, in particular, under  
13 the United Healthcare that we were a liquidating fiduciary as  
14 of the date of the filing which would wipe out any Warren Act  
15 claims, both federal and state, and, thirdly, we believe that  
16 the police power as we've recited in our memo, Your Honor, that  
17 this isn't a matter of police power. As Judge Gonzalez found  
18 in Enron with the California state attorney general, this is  
19 simply they're seeking a monetary award, there is no public  
20 purpose to pursuing this action and, therefore, there is no  
21 exception to the 362 stay and they should be stayed under 362  
22 from pursuing this and then, fourthly, as I mentioned before,  
23 Your Honor, we believe under the first filing that the action  
24 should be disposed of in this court in one proceeding so that  
25 we won't divert it in so many different avenues.

1 THE COURT: Okay.

2 I guess -- I know that the parties spent a fair  
3 amount of time on the merits of the debtor's defenses. It  
4 seemed to me, though, that if you're looking at 7065 the merits  
5 here really are just on whether the stay applies or not; right?  
6 I mean are we -- that's the injunction we're looking to; right?

7 MR. GAZES: That's correct, Your Honor. The  
8 complaint doesn't set forth the defenses to the Warren Act  
9 claims, the complaint is seeking the injunction.

10 THE COURT: Right.

11 MR. GAZES: That's correct, Your Honor, although  
12 there is a --

13 THE COURT: And we're beyond the era -- well, we're  
14 not even there anyway on the facts. I think everyone would  
15 acknowledge that this isn't a far-fetched claim. We're talking  
16 about the validity of defenses to a claim so beyond that we're  
17 not -- I think the case law has moved beyond the notion that  
18 the bankruptcy judge is supposed to look somehow at the  
19 underlying statute, you know, and it's the underlying  
20 regulation or state law statute and determine whether it's  
21 somehow violative of the Bankruptcy Code and I don't think  
22 that's where we are anymore so -- okay. All right.

23 I saw the claimants -- the individual claimants, the  
24 class claimants' statement of support. Unless you want to add  
25 anything, I've read that and I understand that.

1 Okay. So let me hear from the DOL.

2 MR. KUPFERBERG: Seth Kupferberg from the Attorney  
3 General's Office. With me also is Glynnis Ritchie, who is law  
4 student and who came to observe the Court which he had a good  
5 opportunity for this morning.

6 THE COURT: Well, you saw a lot of different things  
7 today, didn't you?

8 MR. RITCHIE: Yes.

9 THE COURT: All right.

10 MR. KUPFERBERG: We, by the way, filed a response to  
11 the claimants which you may not have seen because --

12 THE COURT: I didn't see that; no.

13 MR. KUPFERBERG: -- we turned it around, I think,  
14 pretty quickly under the circumstances.

15 THE COURT: Okay. Could you give me the five second  
16 version of that response?

17 MR. KUPFERBERG: Of the response?

18 THE COURT: Yes.

19 MR. KUPFERBERG: They seem to draw two distinctions  
20 that the Trustee had not drawn. They said, as I understood  
21 their papers, that the police power exception only applied if  
22 the police power proceeding had been initiated before the  
23 bankruptcy filing and only applied if it was a statute which  
24 only the government unit could enforce and I just listed -- I'm  
25 not sure I reread all of the cases that refute that but I

1 listed half a dozen or eight cases that had previously been  
2 cited in which the facts showed that those limitations do not  
3 exist, that is --

4 THE COURT: Okay.

5 MR. KUPFERBERG: So that's what the response was.

6 THE COURT: Okay. All right. You can respond now.

7 MR. KUPFERBERG: The central issue, we believe, is  
8 that 362(b)(4) permits the Department of Labor to conduct this  
9 proceeding under the police power exception to the automatic  
10 stay and I think that the law on that is clear. I understand  
11 it's been argued that the Enron case is to the contrary. I  
12 think the Enron case has been questioned in subsequent cases  
13 even on its own terms. The facts of the Enron case were  
14 unique. As the opinion makes clear, it talks about how this  
15 was the most publicized investigation of fraud in the history  
16 of the United States and there had been seventeen criminal  
17 prosecutions and the California attorney general had said that  
18 the only purpose of this additional proceeding was to collect  
19 money for the state. On those unique facts the Enron decision  
20 said that there is no deterrence in fact being served by this  
21 police power proceeding. All the other cases -- every other  
22 case, I believe, including under labor statutes, under non-  
23 labor statutes, they all speak about how it's police power  
24 whether you're trying to collect restitution or not and the  
25 Supreme Court, although not in a bankruptcy context, has said

1 that severance statutes -- the main severance pay statute which  
2 was quite similar overall to the Warren Act statutes, although  
3 it was enacted before the federal Warren Act statutes, so the  
4 form was different but the Supreme Court has said that that's  
5 unexceptional police power in the Ford Halifax case.

6 So I think it's absolutely clear that this is within  
7 the 362(b)(4) exception and that the Department of Labor has a  
8 right to go ahead.

9 Now, the Trustee has said even if that's true that  
10 you should still enjoin it under Section 105. I think it's  
11 questionable whether Section 105 authorizes overriding the  
12 362(b)(4) exception. There are a couple of cases that say  
13 indictum that it does authorize that but those cases didn't  
14 deal with 362(b)(4) so it didn't matter to those cases.  
15 There's another case that indicates indictum that it may not  
16 authorize overriding it but in that case as in this one we  
17 believe there was no basis for an injunction anyway so there  
18 was no need to reach that issue. But if Section 105 ever  
19 authorizes overriding 362(b)(4) there would have to be some  
20 kind of extraordinary factual showing to do it and there  
21 certainly is not that kind of showing here.

22 What has the Trustee pointed to as a basis to enjoin  
23 the DOL proceeding? I think, basically, two things; one is he  
24 says that it's going to be burdensome to the estate. Well,  
25 essentially, all the work of preparing for this DOL proceeding

1 has been done. He's told you how much time he spent going  
2 through the records, how he met with the DOL and they were able  
3 to agree on the figures. All of that has already been done.  
4 There's an agreement on the figures. The only issue that  
5 remains to be determined in the DOL proceeding is are there  
6 valid defenses to the Warren Act which would obviate there  
7 being any liability and as to those he's prepared -- as Your  
8 Honor said, he's set forth in some detail what he thinks the  
9 defenses are, he has a long affidavit setting forth what he  
10 thinks the defenses are. All that remains to be done is to  
11 present those defenses which, I submit, is not an extraordinary  
12 burden on the estate. It's in fact much less than much else  
13 that the Trustee is doing. If that kind of so-called burden  
14 were enough to justify an injunction, then 362(b)(4) would  
15 never apply because that kind of burden always exists when you  
16 have to go forward. Of course, you have to show up and explain  
17 what your case is but this is not the kind of burden that has  
18 been found to be sufficient even in the cases where litigation  
19 against non-debtors was being enjoined which is what I think  
20 105 is about, not about this kind of situation, and the other  
21 thing he's pointed to is he says, well, if the class action  
22 goes ahead and if the commissioner has decide some factual  
23 issues there may be a collateral estoppel effect. Well, to the  
24 extent that that's true the reason that 105 cases look to  
25 collateral estoppel when they're enjoining litigation against

1 non-debtors which as I've said is what I think 105 is really  
2 about is they say it's true that the litigation which we're  
3 being asked to enjoin is against non-debtors and, therefore,  
4 normally wouldn't be covered by the automatic stay but in this  
5 case the non-debtors who are being sued are executives of the  
6 debtor, principles of the debtor or associates of the debtor,  
7 affiliates of the debtor, so it may be that even though the  
8 judgment will formally be against the non-debtor, the debtor  
9 will ultimately be found to be in privity and the debtor will  
10 be collaterally estopped and, therefore, the debtor will have  
11 been denied either the opportunity to defend itself because of  
12 the collateral estoppel or it will have been denied the right  
13 to stay out of a non-bankruptcy forum if it appears in the non-  
14 bankruptcy forum and presents a case and so for that reason  
15 collateral estoppel has sometimes been found to justify a 105  
16 injunction.

17 But in this case, 362(b)(4), as I've said, means that  
18 the debtor does not have a right to stay out of the non-  
19 bankruptcy forum. The debtor is required to appear in the DOL  
20 proceeding and it can present its defenses and it's obviously  
21 prepared to present its defenses. The work to do that has been  
22 done and if it then should be collaterally estopped by some  
23 factual finding there's nothing unjust about that; the debtor  
24 will have had its day in court, the debtor will have presented  
25 its case. If there's some factual issue on which it then is

1 estopped, so be it. I mean Your Honor has said this is kind of  
2 an odd statute in that it does contemplate that there can be  
3 two separate proceedings but that's what the statute does.

4 THE COURT: Are there any regulations that deal with  
5 that?

6 MR. KUPFERBERG: Any regulations that deal with what?

7 THE COURT: With that fact.

8 MR. KUPFERBERG: With the fact that there can be two  
9 separate proceedings?

10 THE COURT: Right.

11 MR. KUPFERBERG: No, not that I'm aware of, Your  
12 Honor.

13 THE COURT: So how does -- if individual claimants or  
14 through a class action lawyer start a lawsuit to enforce the  
15 New York state Warren Act statute and it's pending before, you  
16 know, a New York state supreme court judge, there's no  
17 regulation that says that has to stop or that that governs if  
18 the DOL subsequently starts its own enforcement action?

19 MR. KUPFERBERG: No. The statute says that payments  
20 awarded by one are deducted from any payments awarded by the  
21 other. You can't collect twice.

22 THE COURT: Right.

23 MR. KUPFERBERG: But, no, to my knowledge there are  
24 no regulations dealing with that. There is, however, a case  
25 which we cited which is not under a Warren Act but which

1 involved an administrative proceeding that was permitted to go  
2 ahead under 362(b)(4) and a similar adversary proceeding had  
3 been brought in the bankruptcy court to resolve essentially the  
4 same issue of whether money was owed under the Davis-Bacon Act,  
5 the federal prevailing wage law, and the bankruptcy court --  
6 this is the Western Drywall case, it's a case from Idaho but I  
7 believe it's exactly the same situation and it's right -- the  
8 bankruptcy court said, since I don't want both to go ahead at  
9 once and I cannot stay the administrative proceeding before the  
10 federal Department of Labor because 362(b)(4) permits it go to  
11 ahead, so what I'll do since I don't want them to go ahead  
12 simultaneously is I'll stay the adversary proceeding and then  
13 we'll resume the adversary proceeding at the conclusion of the  
14 administrative proceeding.

15 Now, I'm not urging you to do anything --

16 THE COURT: Which one was filed first in that case?

17 MR. KUPFERBERG: In that case I believe that the  
18 administrative proceeding had been filed.

19 THE COURT: And it was seeking ongoing relief, it  
20 wasn't just fixing a claim; right? The debtor was doing  
21 something that was still violative?

22 I understand your point about you don't need to do  
23 that but that particular case, I thought, did that.

24 MR. KUPFERBERG: I'm just not sure. I would have to  
25 go back and check on that particular case.

1 THE COURT: Okay. All right.

2 Let me cut through this a little bit. It seems to me  
3 that there is an issue which the parties really have not  
4 addressed here which is that there was an adversary proceeding  
5 started here and there's an earlier claim filed here that the  
6 parties and I have been dealing with and, normally, my  
7 understanding is that that would go first; leave aside  
8 bankruptcy law, it would seem to me that if you had the  
9 hypothetical that I just mentioned, a group of former employees  
10 started a case to enforce the New York Warren Act against  
11 Fortunoff in state supreme court and then the DOL started one  
12 later, I think the state supreme court judge would say, well,  
13 I'm first, and maybe I'm missing that but I think that's what  
14 would happen and it doesn't matter whether there's a stay or  
15 not I just think that's how it would proceed and --

16 MR. KUPFERBERG: Well, Your Honor --

17 THE COURT: Let me finish.

18 MR. KUPFERBERG: I'm sorry.

19 THE COURT: Because I think that leaving aside the  
20 mandatory aspects of that it just seems to me that as a  
21 practical matter that's what the parties should be doing here.  
22 I mean I guess I don't understand what the haste is to fix this  
23 claim when I think, ultimately, particularly given the  
24 appellate rights under the New York statute, in all likelihood  
25 it's going to be done here in a way that is more efficient and

1 cheaper for everybody. This isn't a case where we're talking  
2 about making a legal distinction under 362(b)(4) based on the  
3 state seeking injunctive relief as opposed to enforcing a  
4 claim. I understand your points on that.

5 On the other hand, as a practical matter, this is  
6 fixing a claim. It's fixing a monetary amount and then whether  
7 there's defenses to it. In bankruptcy cases nine times out of  
8 ten those are negotiated in light of what creditors are going  
9 to get in the case. We don't really know that yet, we're going  
10 to know it pretty soon, I think, and generally speaking, Mr.  
11 Gazes is pretty good on his projections because, you know, he  
12 makes his living litigating preference cases and objecting to  
13 claims so he knows the merits of that and, by the way, he  
14 settles most of those cases as you know. So at that point you  
15 all will be in the -- all of you; the federal Warren Act  
16 claimants, the individual state Warren Act claimants and the  
17 Department of Labor, will be in a position to deal with this in  
18 a dollars and sense manner and it just seems to me that, you  
19 know, I'm scratching my head at why given that and given the  
20 timing here of when things were filed there's a rush to go and  
21 litigate this issue and I agree with you that most of the  
22 points in the Enron case can be viewed as sui generis,  
23 primarily the point that Judge Littlefield pointed to, which is  
24 that Judge Gonzalez made a big point of the fact that in  
25 addition to the state of California investigating Enron there

1 was this huge federal investigation. So the California points  
2 seem to be sort of the tail wagging the dog but he also points  
3 out that it really does seem to be forum shopping given that  
4 the California AG had filed a proof of claim and it was there  
5 and it was going to be dealt with in the bankruptcy process.  
6 This is one step beyond that because you have sort of the  
7 beneficiaries of what the DOL is trying to do here already  
8 active and, by the way, they're asserting both federal and  
9 state claims so I'm going to be dealing with them anyway. It  
10 seems to be kind of poking a finger in their eye to say that  
11 they have to, you know, file two proceedings when I can --  
12 ultimately, I can deal with all the Warren Act claims, not just  
13 state but federal, and as a practical matter you all are going  
14 to deal with them because ultimately I'm convinced you'll  
15 settle them.

16 So you all have been working together very well until  
17 this point in putting off this issue. I'm just having a hard  
18 time seeing why you shouldn't put it off some more.

19 MR. KUPFERBERG: There's a legal response which is  
20 that we think that 362(b)(4) just gives us an absolute right to  
21 go ahead which you understand --

22 THE COURT: I understand that.

23 MR. KUPFERBERG: -- but let me address the --

24 THE COURT: I'm not necessarily agreeing with it but  
25 I understand it.

1 MR. KUPFERBERG: No, but you understand it whether  
2 you agree with it or not.

3 THE COURT: Right. Right.

4 MR. KUPFERBERG: So by addressing the practicalities  
5 I just want to make clear that I'm not --

6 THE COURT: No, I know.

7 MR. KUPFERBERG: -- waiving that in any way.

8 THE COURT: Absolutely.

9 MR. KUPFERBERG: That even if you think we're being  
10 impractical we still don't think you have the right to do it.

11 THE COURT: Right. Right. You have a right to be  
12 impractical. I understand that.

13 MR. KUPFERBERG: Right. Right. Okay.

14 But let me address the practicalities. It's true  
15 that they filed their adversary proceeding before we scheduled  
16 our -- or formally sent out a subpoena. In every other way our  
17 proceeding, I think, is far more advanced than theirs. We've  
18 met with the Trustee, we've reached agreement on the numbers  
19 and the reason that it took a long time to initiate the formal  
20 proceeding as I think the reply declaration makes clear is that  
21 we sent out a request for information at about the same time  
22 that the purported class action was filed. It took a long time  
23 for us to get the information back. We were trying to wait  
24 until we could reduce the numbers to a correct figure and  
25 that's what took a long time. That's why we filed on the bar

1 date or the day before the bar date, we were hoping to get it  
2 down to an accurate figure that hadn't been done yet. As it  
3 turned out the initially filed claim was considerably higher  
4 than turned out to be justified when we had had a chance to  
5 look at all the records.

6 The reason it took a while for the formal initiation  
7 of the administrative proceeding was not that we were sitting  
8 back and doing nothing while the class action plaintiffs were  
9 actively pursuing all kinds of discovery and there were lots of  
10 proceedings in the class action cases. In reality, the  
11 situation is almost exactly the reverse. If you look at  
12 anything but the date of the filing, I think by any other  
13 measure our action is far more advanced and it would make far  
14 more sense to just complete this quickly.

15 THE COURT: But, of course, all of that was being  
16 done also in the context of trying to liquidate the claim that  
17 was filed in the bankruptcy case.

18 MR. KUPFERBERG: But it began even before the claim  
19 was filed in the bankruptcy case. It was -- but, yes, that's  
20 right.

21 THE COURT: But I mean all of the progress you've  
22 made with Mr. Gazes in fixing the -- or coming close to fixing  
23 the dollar amount has been in the context of -- it could easily  
24 be in the context of resolving the claim too.

25 MR. KUPFERBERG: Well, it serves both purposes.

1 THE COURT: I guess on the (b)(4) -- well, no, I'm  
2 sorry, you had more to stay on that.

3 I mean is there some reason that there needs to be --  
4 how fast would this happen even?

5 MR. KUPFERBERG: Well, the hearing was scheduled for  
6 July 15th until it was put off because of the filing of this  
7 complaint.

8 THE COURT: Right.

9 MR. KUPFERBERG: I think it would have been completed  
10 by this time probably.

11 THE COURT: But then it's by -- then you have this  
12 review process; right?

13 MR. KUPFERBERG: Well, if they want to appeal to a  
14 state court they can; yes, but the other thing I wanted to say  
15 is I think that there are -- and this may account for -- you've  
16 called it "forum shopping" -- I think that in 362(b)(4) case it  
17 can be called "forum shopping." One could always say, well,  
18 why does the government need to liquidate this in the way it is  
19 choosing? It could just as well liquidate the claim in  
20 bankruptcy court. But I think the forum shopping is probably  
21 on the part of the Trustee and I think that part of the reason  
22 for that is that there are defenses to the class action claim  
23 which in the context of the DOL proceeding basically, although  
24 he's tried to argue that they exist in the context of the DOL  
25 proceeding, I don't think they do; the main one being that in

1 the context of the class action claim there would be a serious  
2 question at least -- and I am not taking any position on it,  
3 our sympathies, I think, would be with the plaintiffs on it,  
4 but Mr. Gazes will certainly argue that those employees who  
5 didn't file by the bar date individually cannot be included in  
6 that class action claim. Now, that's an issue that would have  
7 the potential, I guess, to drive down the amount substantially  
8 --

9 THE COURT: But, again, I raised this point with Mr.  
10 Gazes too. I'm having a hard time with this dispute because  
11 unlike the federal Warren Act the DOL has the ability to bring  
12 something on behalf -- not on behalf of but to distribute the  
13 proceeds of a recovery to all the victims; right?

14 MR. KUPFERBERG: Right.

15 THE COURT: I don't know whether DOL has any criteria  
16 for that and it would take into account whether they filed a  
17 proof of claim or not, I don't know.

18 MR. KUPFERBERG: It would not.

19 THE COURT: Well --

20 MR. KUPFERBERG: I don't believe commissioner would,  
21 I guess it would be up to her but I don't believe that she  
22 would.

23 THE COURT: Okay.

24 MR. KUPFERBERG: What I'm saying is that that issue  
25 can be completely avoided, you know, the litigation of that

1 issue, the briefing of that issue, the consideration of that  
2 issue, none of that is going to matter in the DOL proceeding --

3 THE COURT: But it's still in front of me. That's  
4 why the first file point is important.

5 MR. KUPFERBERG: Well, it --

6 THE COURT: It would seem to me that we should deal -  
7 - I mean you're just leaving them hanging then.

8 MR. KUPFERBERG: I think that it would -- if the  
9 commissioner finds -- I guess it would be in front of you in  
10 connection with the federal claim but --

11 THE COURT: No, it wouldn't because that's -- what  
12 I'm saying is if you prevail, if I find that the stay doesn't  
13 apply and you go ahead and litigate this issue and you  
14 ultimately prevail, what are they doing in the meantime?

15 MR. KUPFERBERG: What is who doing in the meantime?

16 THE COURT: What are the state individual claimants  
17 and class claimants doing in the meantime? I mean it just  
18 seems to me that's one of the reasons they should all be  
19 together so that you could focus on that issue which is the  
20 glitch, I think, in the statute.

21 MR. KUPFERBERG: Well, one thing that --

22 THE COURT: How do you -- I'm sorry, can I interrupt  
23 you?

24 How do you deal in practice with the situation where  
25 individual or class claimants are litigating and the DOL is

1 litigating, too, on their behalf? I mean you do that in  
2 separate proceedings?

3 MR. KUPFERBERG: The statute seems to contemplate --

4 THE COURT: I know the statute says you can --

5 MR. KUPFERBERG: Yes.

6 THE COURT: -- but in practice what do you do?

7 MR. KUPFERBERG: Well, in practice -- I don't know  
8 that it's -- it's a new statute and I don't think it's arisen  
9 except in this case but --

10 THE COURT: Well, all right. I'm suggesting that  
11 maybe we should focus on that because it creates a real  
12 problem.

13 MR. KUPFERBERG: Well, what I'm suggesting that if  
14 the Court considers it a real problem the appropriate thing to  
15 do in this case would be to let the DOL action go ahead and the  
16 class complaint which Mr. Gazes said that they've sat back up  
17 until now, they can continue to sit back --

18 THE COURT: Well, in the meantime the people that  
19 you're looking to collect on are opposing that and they say,  
20 well, we want to control our destiny, we want to litigate those  
21 issues because we think, you know, we'll do it better. I don't  
22 know. They'd want to have a say in it at least.

23 MR. KUPFERBERG: Well, Your Honor, with respect and  
24 without casting aspersions, the only way in which I can see  
25 that -- I mean I think that the real issue is that to the

1 extent that there's recovery through the class action, class  
2 counsel is likely to be able to ask for attorneys fees and to  
3 the extent that there is a recovery through our action that's  
4 more difficult. I don't see any other --

5 THE COURT: Well, but I don't think it's just the  
6 fees, I think it's who they want to have litigating on their  
7 behalf. I mean I just, you know --

8 MR. KUPFERBERG: We are not telling the Court not to  
9 let them proceed as well. If the --

10 THE COURT: Then there's a potential for different  
11 results and that would be a disaster.

12 This is what I'd like you to do.

13 MR. KUPFERBERG: Yes.

14 THE COURT: Because this issue has not been dealt  
15 with. I'll give you my preliminary views on the (b)(4) point  
16 but I think, ultimately, there's more to it than that.

17 On the (b)(4), I think there is still some validity  
18 to the notion of looking to the primary purpose of the  
19 government's action and I understand that there is here as with  
20 all sorts of other labor provisions, there is a true regulatory  
21 purpose; you don't want companies terminating employees without  
22 their required notice and in effect getting away with paying  
23 less for a GOB sale than, you know, the people who comply with  
24 the law out there but, clearly, that's not the only purpose  
25 here. It's -- you know, there's a claim filed in the case

1 looking for recovery of money and so, therefore, I have to  
2 decide the primary purpose and I think in that regard the  
3 existence of the claim here and the existence of the claim by  
4 the overlapping beneficiaries of the DOL suit is highly  
5 relevant and, ultimately, I think that's how the Enron case can  
6 get reconciled with the other cases is that fact and the fact  
7 that -- you know, I don't see the Trustee -- if this were a  
8 case where the Trustee was dragging his feet, then I think it  
9 would be a very different point; the state, you know, clearly  
10 has a right as part of its regulatory mandate to get a result  
11 here. I don't think the Trustee is dragging his feet, I think  
12 he's moving it along as rapidly as you'd normally move it  
13 along.

14 So I'm still up in the air on that aspect of the  
15 (b)(4) point but what I am troubled by is the fact that I have  
16 the claim and I have the request for class status by the  
17 individual claimants and both the claim and that was first and  
18 there's clearly an overlap, there's clearly a potential for  
19 disparate results and my concern is that even if this were not  
20 a bankruptcy case, the first court that had it would take it  
21 and there's a lot of validity behind that doctrine, the first  
22 filed doctrine. Now, I know there are exceptions to it and the  
23 like. Frankly, I'd like you all to brief that issue. I mean  
24 if people really want to have a long opinion on 362(b)(4) and,  
25 you know, the first filed doctrine and all of these issues I'm

1 happy to do it but I really think this isn't the case where  
2 people really want to do that because I think you have a  
3 Trustee who is doing his job and wants to get this over with  
4 and unless I'm missing something I'm able to read the Warren  
5 Act -- the state Warren Act -- it just makes more sense for me  
6 to deal with all these claims at once; there's a federal and  
7 state Warren Act claim in front of me as well as a state one.  
8 The state one, there's overlapping beneficiaries and I'm like  
9 95 percent sure it's going to be settled. This isn't the case  
10 to be rushing to -- this is not like people who aren't getting  
11 paid their tips, you know, like Judge Garrity's case. I would  
12 have done exactly what he did in that case; this is, you know,  
13 the debtor wasn't paying the tips. The Trustee is going to pay  
14 what he owes here -- what the estate owes and it's going to be  
15 decided on, I think, a very quick and practical timetable and I  
16 doubt there will be an appeal and it just seems to me -- I'm  
17 talking to you now just on a practical basis that you all ought  
18 to focus on that in addition to briefing this first filed  
19 issue.

20 MR. KUPFERBERG: When do you -- I did notice the  
21 first filed issue but I thought there was enough briefing and I  
22 --

23 THE COURT: I know.

24 MR. KUPFERBERG: When do you want briefing on that?

25 THE COURT: I don't know, thirty days from today?

1           What's not coming through to me -- and maybe it  
2           should but it's just not, I haven't picked up on it -- is that  
3           I don't sense a real regulatory purpose in having this issue --  
4           this claim liquidated.

5           MR. KUPFERBERG: Well, as I tried to argue in the  
6           papers and apparently not clearly enough, there is a kind of a  
7           declaratory aspect to adjudicating police power cases. I think  
8           that this is clear from the SEC v. Brennan case and it's clear,  
9           really, from all the cases in which -- and there are many of  
10          those -- in which a debtor was out of business and there are  
11          many cases in which it was clear that little or no money would  
12          actually be collected and the police power is at stake because  
13          --

14          THE COURT: I understand that but in terms of the  
15          timing I don't see it. I mean Brennan, having represented him,  
16          was a creep; all right?

17          MR. KUPFERBERG: I didn't realize Your Honor  
18          represented him --

19          THE COURT: Well, not for very long but, I mean  
20          that's not what's happening here. The people that ran their  
21          restaurant -- the Nungun [sic] restaurants -- were creeps. I  
22          just don't see that here. I don't know if that gets into an  
23          opinion but I think that it's important in terms of evaluating  
24          the issue.

25          MR. KUPFERBERG: But the declaratory value of, for

1 example, adjudicating the -- let me just finish briefly.

2 THE COURT: Okay. All right.

3 MR. KUPFERBERG: Of adjudicating, for example, the  
4 unforeseen business circumstances --

5 THE COURT: Right.

6 MR. KUPFERBERG: -- defense or the liquidating  
7 fiduciary defense --

8 THE COURT: Right.

9 MR. KUPFERBERG: -- or there's another defense whose  
10 name is escaping me for the moment but the declaratory value of  
11 saying what do those mean under the New York Warren Act and the  
12 deterrent purpose served by clarifying that has nothing to do  
13 with whether Mr. Fortunoff is a creep or not.

14 THE COURT: I understand that, however, it's going to  
15 be declared one way or another; right? I mean it's not like  
16 they're trying to avoid -- the Trustee is not trying to avoid  
17 that issue.

18 MR. KUPFERBERG: Yes, but the point is that the  
19 government unit -- that's what the police power exception  
20 means; that the government unit has a right to declare it, that  
21 it's -- and you can call that forum shopping but --

22 THE COURT: Well, but it isn't -- you know, it is  
23 different. That's an important distinction, I think, here. It  
24 isn't really the government -- well, that's why I think it may  
25 be forum shopping because it's not the government unit saying,

1 I'm enforcing this, it's an adjudicatory body enforcing it and  
2 I think that's a big difference.

3 You know, what you're arguing to me really is more  
4 abstention or Sonax than before. I mean this isn't the DOL  
5 enforcing this; right? This is --

6 MR. KUPFERBERG: I think it is the DOL. I'm not sure  
7 -- I don't understand your point.

8 THE COURT: Well, the claim is being enforced. It's  
9 really just who enforces it.

10 We're not preventing the DOL from expeditiously  
11 getting a determination and, frankly, even collecting on it.  
12 The Trustee is not fighting that, he just wants to have it done  
13 in an orderly way and we're really just talking about what  
14 adjudicatory body determines those defenses. That, to me, is  
15 more of an abstention issue than a (b)(4) issue. The  
16 enforcement power there is whether DOL can file a claim so that  
17 someone can adjudicate the issue in the forum they want and I  
18 don't know how much that really is enforcement as opposed to  
19 forum shopping.

20 MR. KUPFERBERG: I agree that there are some  
21 similarities to abstention but I think that what Your Honor is  
22 saying could be said of every 362(b)(4) case. It can always be  
23 said that the government unit can enforce this claim by coming  
24 into the bankruptcy court and having the bankruptcy court  
25 decide it but the point of the 352(b)(4) exception is that you

1 don't have to go into the bankruptcy court, that you can go to  
2 the same forum that you would have gone to in the absence of  
3 the bankruptcy --

4 THE COURT: Well, and what I'm saying is in this  
5 context where we have the beneficiaries of the statute here  
6 already and this is the forum they want and you have the  
7 potential for inconsistent results and, frankly, this was  
8 first, I'm just not sure that the (b)(4) is that clear in that  
9 context. I'd rather not have to write an opinion on that  
10 issue. I really think that -- you know, again, if the Trustee  
11 is dragging his feet, then, yes, then I understand your point  
12 completely. I just don't see -- this doesn't seem to me to be  
13 the right one, it's just going to be another case to  
14 distinguish.

15 MR. KUPFERBERG: When do you want the briefing on --

16 THE COURT: Thirty days from today.

17 MR. KUPFERBERG: Thirty days.

18 THE COURT: And you can write simultaneous briefs and  
19 then if you want, I'll give you ten days to do a reply, both  
20 sides.

21 MR. KUPFERBERG: Okay.

22 THE COURT: You should e-mail them to chambers.  
23 Normally, I don't like things e-mailed to chambers until I've  
24 ruled but I will have forgotten about this thirty days from now  
25 so you should e-mail it so I'll remember it.

1 MR. KUPFERBERG: E-mail the brief to chambers?

2 THE COURT: Yes.

3 MR. KUPFERBERG: Okay.

4 THE COURT: As well as, of course, to each other.

5 If you want to respond to the point that was in the  
6 recently filed thing by the DOL you can do that in that same  
7 brief.

8 MR. GAZES: Your Honor basically covered the point  
9 that I think we were trying to make and I think you brought it  
10 out which is that the police power only applies as an exception  
11 if the DOL is going to be burdening [sic] certain conduct. So  
12 as to deter it, that's what we're doing.

13 THE COURT: All right.

14 MR. GAZES: So what are the --

15 THE COURT: But that's been briefed already.

16 MR. GAZES: I think you're right, Your Honor, so I  
17 have nothing further.

18 THE COURT: Okay. All right. Okay.

19 But, you know, I really think you guys should use  
20 that thirty days also to focus on the claims.

21 MR. GAZES: We're trying, Your Honor. I've made the  
22 point over and over again. I'm representing the very same  
23 parties that these parties are representing. I mean they are  
24 the beneficiaries of this estate. What I recover is going to  
25 inure to their benefit and, you're right, it is a settleable

1 issue -- the amount -- because of the defenses which creates  
2 the gray here.

3 THE COURT: Okay.

4 MR. GAZES: And we just need to put that off and I  
5 believe my other half here is willing to wait to see what that  
6 resolution might be depending upon --

7 THE COURT: What resolution?

8 MR. GAZES: What the estate is going to have.

9 THE COURT: Oh. Well, maybe you're enough along so  
10 you can deal with it not in terms of paying money but fixing  
11 the claim.

12 MR. GAZES: Yes.

13 THE COURT: I mean it just seems to me that you don't  
14 have to win the legal point of every issue, you can settle them  
15 and this may be one to settle.

16 MR. KUPFERBERG: Well, we'll look at it, Your Honor,  
17 but we have discussed and I mean I will take back what you've  
18 said. I don't know what else I can say on it.

19 THE COURT: Okay. All right.

20 MR. GAZES: Thank you, Your Honor.

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CERTIFICATION

\* \* \* \* \*

I certify that the foregoing is a transcript from an  
electronic sound recording heard in the United States  
Bankruptcy Court, Southern District Of New York, 12:25 to  
13:22, of the proceedings in the above-entitled matter.

S/ Carla Nutter\_\_\_\_\_

CARLA NUTTER

Dated: September 28, 2010